No. 384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

GUARANTY TRUST COMPANY OF NEW YORK, as Trustee under St. Louis Southwestern Railway Company First Terminal and Unifying Mortgage dated January 1, 1912,

Petitioner,

against

BERRYMAN HENWOOD, Trustee of St. Louis Southwestern Railway Company, Debtor, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and SOUTHERN PACIFIC COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Guaranty Trust Company of New York, a New York corporation, respectfully petitions for a writ of certiorari to review a final decision of the Circuit Court of Appeals for the Eighth Circuit, rendered in the above-entitled cause on July 15, 1938 and reported in 98 F. (2d) 160. This decision affirmed an order entered by the United States District Court for the Eastern District of Missouri, Eastern Division, on March 21, 1938 (unreported) denying in

part and allowing in part a claim against St. Louis Southwestern Railway Company, the Debtor in reorganization proceedings under Section 77 of the Bankruptcy Act.

Questions Presented.

1. Does the Joint Resolution of June 5, 1933 (48 Stat. 112), abrogating "gold clauses", annul a negotiable contract executed in 1912 by the Debtor wherein it agreed to pay to the holder of the instrument a stated number of Dutch guilders at Amsterdam, Holland?

2. Would the identical promise (otherwise valid) be void merely because of an unexercised and subsequently discarded option in the obligee to obtain, as an alternative to payment in guilders, payment in any one of four other specified currencies, one of these discarded alternative currencies having been gold coin of the United States of or equal to the standard of weight and fineness as it existed January 1, 1912?

3. In the case of a five-part alternative promise to be exercised at the election of the creditor, one of the alternatives being gold coin of the United States of specified weight and fineness, does the Joint Resolution of June 5, 1933, properly construed, abrogate the other alternatives and require the discharge of the entire contract upon the payment of the gold coin amount in legal tender dollars, contrary to the election of another currency by the creditor?

4. If so, is the Joint Resolution a constitutional exercise of the power of Congress?

Summary Statement of Matter Involved.

As of January 1, 1912 (R. 129), the First Terminal and Unifying Mortgage of the Debtor was authorized and executed. Under a general provision to such effect in the mortgage (R. 38), the form of coupon bond set forth in the mortgage (R. 19, 130) and issued thereunder was headed:

"No. .....

$1,000.	$1,000.
U. S. Gold	U. S. Gold
£205 15s. 2d. Stg.	2490 Guilders
Marks 4200, D. R. W.	5180 Francs"

and provided that the Debtor

> "hereby promises to pay to the bearer, or, if registered, to the registered holder, of this bond, on the first day of January, 1952, at its office or agency in the Borough of Manhattan, City and State of New York, One thousand Dollars in gold coin of the United States of America, of or equal to the standard of weight and fineness as it existed January 1, 1912, or in London, England, £205 15s 2d, *or in Amsterdam, Holland, 2,490 guilders,* or in Berlin, Germany, marks 4200, D. R. W., or in Paris, France, 5180 francs, . . . Payment of the principal and interest of this bond will be made, *at the holder's option,* at the office or agency of the Railway Company in the Borough of Manhattan, in the City and State of New York, or *at designated offices in the foreign cities and countries above mentioned*" (R. 19).[1]

The coupons for interest also contained multiple currency provisions substantially similar in form to those in

[1] Italics in this petition and brief ours; unless otherwise designated.

the bonds themselves (R. 22, 131). The 5636 bonds immediately involved here (R. 126) are all coupon bonds.

These bonds were issued in 1912 by the Debtor to an original group of American purchasers who paid dollars therefor and were resold to the public generally (R. 132-4). Before executing the mortgage, the Debtor made arrangements for the payment from time to time of the foreign exchange value of such guilders and other foreign currencies as might be demanded pursuant to the foreign currency alternatives (R. 172-3). The fact that such arrangements were made demonstrates that the Debtor had no thought of the guilder option as a gold clause in fact or in effect. Furthermore, the Debtor's president in his letter (summarized in the offering circular of the bonds) held forth to intending purchasers the multiple currency options (R. 133-4, 160). Clearly these options were advisedly inserted as an inducement to purchasers and were intended to be relied upon. The record does not show to what extent purchasers then and subsequently relied upon this inducement, but it does show that the Debtor received valuable and sufficient consideration for those bonds, of which the guilder option was an integral part, and that the bonds have been listed on the New York Stock Exchange since 1915 and have been actively traded in from that time on (R. 132-4).

On December 12, 1935, the Debtor filed its petition for reorganization under Section 77 of the Bankruptcy Act, and on the same day the Court approved the petition. On December 28, 1935, the District Court generally enjoined all persons, firms and corporations from bringing or continuing any suit against the Debtor or interfering with its property (R. 183). On January 1, 1936, the Debtor failed

to pay interest on the coupon bonds as well as other obligations (R. 159) which non-payment was made an event of default on April 1, 1936 by the First Terminal and Unifying Mortgage (R. 66).

Such default gave rise to broad powers in the petitioner as trustee under the mortgage (R. 69-71, 76), authorizing it to protect and enforce the rights of bondholders thereunder by suits in equity or at law, or by any other proper or legal remedies, and also to accelerate the maturity of the bonds. These broad powers necessarily included a corollary or ancillary right in the trustee to elect on behalf of the bondholders the most advantageous currency within the range of alternatives granted by the coupon bonds and the mortgage.

On April 11, 1936, an event of default having occurred on April 1, 1936, the Debtor applied for an injunction, enjoining the petitioner from accelerating the maturity of the outstanding First Terminal and Unifying bonds. The District Court issued the injunction on May 5, 1936 (R. 163); this order was reversed by the Circuit Court of Appeals for the Eighth Circuit on November 13, 1936 (*Guaranty Trust Company of New York* v. *Henwood*, 86 F. [2d] 347) and certiorari was denied by this Court on February 15, 1937, 300 U. S. 661. Immediately after the dissolution of the injunction, the petitioner served a notice of acceleration as of May 5, 1936, the date upon which the injunction was granted (R. 136).

Meanwhile, on June 4, 1936, the petitioner gave public notice to the effect that it intended within a short time to elect to receive payment in guilders, and to file a proof of claim on a guilder basis, in respect of all coupon bonds the holders of which had not previously acted in their own

behalf (R. 179).[1] Thereafter on September 24, 1936, the petitioner caused formal demand and protest to be made by a bailiff in Amsterdam, in accordance with the law of Holland (R. 169, 174), requiring the Debtor to pay immediately in guilders the principal and interest to it on behalf of all bondholders who had not previously made their own elections. This demand was not honored.[2] On the same day the petitioner verified and mailed its proof of claim on behalf of those bondholders who had not done so in their own behalf (R. 2-6).

After the dissolution of the injunction against acceleration and pursuant to leave of court (R. 163), petitioner verified a supplement to its proof of claim on March 12, 1937 (R. 104) with particular reference to the exchange value of the guilder. It was stipulated that the exchange value of the guilder was 67.78¢ on *all* the material dates: viz: December 12, 1935—when the Debtor filed its petition; May 5, 1936—when the acceleration of principal became effective; and September 24, 1936—when the demand for guilders and protest of non-payment were made in Amsterdam and when petitioner's proof of claim on a guilder basis was verified and mailed (R. 140).

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[1] This notice, published in four American and three foreign newspapers, requested bondholders who did not desire an election to be made in guilders to notify the petitioner (R. 177). After the publication of the notice some bondholders specifically authorized the petitioner to elect guilders for them (Claimant's Exhibit 9, R. 180-3); a few bondholders filed individual proofs of claim electing dollars; while a more numerous class individually elected guilders or the dollar equivalent.

[2] The failure of the Debtor to maintain an office or agency in Amsterdam (R. 132) despite its agreement to make payment there constituted a refusal which under well-settled authority rendered any demand unnecessary. *Sokoloff* v. *National City Bank*, 250 N. Y. 69.

The aggregate amount of principal thus claimed for the holders of 5,636 bonds by the petitioner was 14,033,640 Dutch guilders (2490 being the principal amount of guilders promised in each bond), and, by applying the stipulated rate of exchange of 67.78c, the aggregate dollar value of the claim for the principal amount due in guilders was $9,512,001.19.

The District Court disallowed the guilder claim in its entirety and made no ruling whatsoever regarding the proper guilder exchange rate. Instead, the District Court allowed the claim to the extent of $1,000 as principal for each bond, or $5,636,000 for the 5,636 bonds, and interest on this sum at the rate of 5% per annum from July 1, 1935, to December 12, 1935 (R. 126). This allowance was less by $3,876,001.19 than the dollar value of the aggregate amount of guilders claimed by the petitioner on account of principal, in accordance with the precise terms of the bonds, and correspondingly less than the amount claimed as interest.

The petitioner took two appeals from the order of the District Court; and, after consolidation of the appeals (R. 218) and argument thereon, the Circuit Court of Appeals for the Eighth Circuit, on July 15, 1938, affirmed the order of the District Court (R. 254-5, 98 F. [2d] 160).

The protestants raised other objections to petitioner's proof of claim than the one above discussed, but neither the District Court nor the Circuit Court of Appeals passed on such objections, the District Court finding that it was "unnecessary" to do so (R. 143).

Reasons Why a Writ of Certiorari Should Issue.

1. The Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law in direct conflict with a previous decision of the United States Circuit Court of Appeals for the Second Circuit in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company*, 81 F. (2d) 11, cert. den. *sub. nom. Henwood, Trustee* v. *Anglo-Continentale Treuhand, A. G.*, 298 U. S. 655.

In that case the Circuit Court of Appeals for the Second Circuit held, with a unanimous opinion written by Judge Learned Hand, that the very guilder alternative in the bonds and coupons here involved was enforcible according to its terms and was beyond the reach of the Joint Resolution. That a direct conflict exists between the decision of the Second Circuit Court of Appeals in that case and the decision of the Eighth Circuit Court of Appeals in the instant case is beyond argument. The District Court, recognizing that its conclusions were wholly inconsistent with those of the Second Circuit Court of Appeals, as to which this Court had denied certiorari, attempted to justify its departure from the law established by that case, first, upon the theory that the law had been changed by the subsequent decision of this Court in *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324, and second, in its own words, because "in any event this Court is not bound by the decision of said Circuit Court of Appeals in said case" (R. 143).

The Circuit Court of Appeals also recognized the direct conflict between its decision in the instant case and the previous decision of the Second Circuit in the *Anglo-Continentale* case. In the opinion written by Judge Stone, the Court said (R. 248; 98 F. [2d] at p. 163):

> "Appellant relies mainly upon Anglo-Continentale Treuhand, A. G. *v.* St. Louis Southwestern Railway Co., 81 F. (2d) 11 (C. C. A. 2) and McAdoo *v.* Southern Pac. Co., 10 Fed. Supp. 953 (D. C. N. D. Cal.). Each of those cases decided that the Resolution did not cover multiple currency provisions, such as here—the former case involving bonds of the same issue as before us."

The Court, refusing to follow these decisions, continued (R. 249; 98 F. [2d] at p. 163):

> "We are fully conscious of the fine ability of the Judges who wrote and concurred in the opinions urged by appellant; and we are sensitive to the desirability of harmony in the decisions of the various Circuits. However, we are not permitted thus to relieve ourselves of the duty of examining and determining for ourselves the issues coming before us."

A comparison of the opinions in the *Anglo-Continentale* case and the *McAdoo* case, upholding the multiple currency options, with the opinion in the instant case, holding that such options are destroyed by the Joint Resolution of June 5, 1933, fails, we suggest, to disclose any reason which would justify the Court below in creating disharmony between the Circuits. Indeed, disharmony appeared among the judges of the Eighth Circuit Court themselves in consequence of the decision in this case.

In *Emery Bird Thayer Dry Goods Company* v. *Williams*, 98 F. (2d) 166, the Eighth Circuit Court of Appeals held that the Joint Resolution of June 5, 1933 did not reach a lease requiring the payment as yearly rental of a stated amount in gold coin of the United States of a specified standard of weight and fineness, or 557,280 "grains of pure,

unalloyed gold"; provided, however, that the lessors could at their option require the yearly payment of $24,000 in lawful currency of the country. Two of the three judges were of the opinion that the lessee could not avoid the contractual duty of paying the grains of pure, unalloyed gold where the lessor refused to exercise his option to receive legal tender currency. Judge Woodrough, however, dissented for the reason, among others, that ". . . the decision in this case is directly contradictory to the opinion of this court in *Guaranty Trust Co.* v. *Berryman Henwood, Trustee*, 98 F. (2d) 160, just handed down" (98 F. [2d] at 178). This would seem to be obvious. If the Joint Resolution does not reach a contract to pay at designated places in the United States a specified number of grains of pure, unalloyed gold, it should follow, *a fortiori*, that the Resolution cannot touch a contract to pay a stated number of Dutch guilders in Amsterdam, Holland.[1]

2. The Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law which has not been, but should be, settled by this Court, and has decided it in a way probably in conflict with the applicable decisions of this Court.

The question involves the validity and scope of an important Federal statute. The importance of this question has been previously recognized by this Court in *Norman* v. *Baltimore & Ohio R. R.*, 294 U. S. 240, *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324.

[1] On August 29, 1938, the Eighth Circuit Court of Appeals granted a petition for rehearing, set aside the decree entered pursuant to the opinion discussed, and set the case down for reargument on October 31, 1938.

335, and in other cases.[1] The Joint Resolution of June 5, 1933 (48 Stat. 112) if construed to nullify a promise to pay a specified amount of guilders at Amsterdam, Holland, would not be the same resolution that was upheld in the *Norman* and *Holyoke* cases as a proper exercise by Congress of its constitutional power over the coin and currency of the United States. The extraterritorial scope and the unreasonable application of the Resolution so as retroactively to destroy valid contracts—the construction given to the Joint Resolution by the Circuit Court of Appeals—raises grave doubts as to the validity of the Resolution when so applied.

The question presented in this case is also of the utmost importance, because of the prevalence of litigation within the country involving the identical issue, on the outcome of which large amounts of money depend. Although multiple currency contracts containing a gold clause were by no means as common as the straight gold clause, the fact that a particular form of covenant affected or claimed to be affected by the Joint Resolution was rare and exceptional has not deterred this Court from granting certiorari "because of the importance of the question". *Holyoke Power Co.* v. *Paper Co.*, 300 U. S. 324, 335.

The decisions in New York State alone on this important and essentially Federal question are in hopeless confusion. In May, 1935 the Appellate Division, First Department, an intermediate appellate court, held (by vote of three to one) in *City Bank Farmers Trust Company* v. *Bethlehem Steel Company*, 244 App. Div. 634, that the multiple currency clause in bonds issued by the Bethlehem Steel Company

[1] See also *Nortz* v. *United States*, 294 U. S. 317; *Perry* v. *United States*, 294 U. S. 330; *Smyth* v. *United States*, 302 U. S. 329.

was unenforceable in the hands of an American citizen. The exact basis of the opinion of the majority of the Court has since been the subject of much controversy in the lower courts of New York, largely because the majority opinion did not go so far as to hold that the multiple currency provision came within the language of the Resolution, but relied upon an unexpressed "legislative intent" and considerations of "good citizenship". Mr. Justice Merrill dissented vigorously, and in the next year the Court of Appeals of the Second Circuit in *Anglo-Continentale Treuhand, A.G.* v. *St. Louis Southwestern Railway Company*, 81 F. (2d) 11, accepted his reasoning and expressly repudiated the majority opinion in *City Bank Farmers Trust Co.* v. *Bethlehem Steel Co.* Many of the subsequent decisions in the New York State courts have been irreconcilable.[1] Indeed the justices of the Appellate Division, First Department, are still in disagreement. In the most recent case decided by that Court, *Zurich General Accident and Liability Insurance Company, Ltd.* v. *Bethlehem Steel Company*, 254 App. Div. 839 (June 17, 1938), three justices, constituting a majority, voted to follow the earlier *City Bank Farmers Trust Company* case, whereas the other two justices dissented "for

[1] See decision of Justice Valente in *Anglo-Continentale Treuhand, A.G.* v. *Southern Pacific Company*, 299 N. Y. Supp. 859, affirmed without opinion by the Appellate Division, First Department, 251 App. Div. 803; the decisions of Justice Hofstadter in *Zurich General Accident & Liability Insurance Co. Ltd.* v. *Bethlehem Iron & Steel Corporation*, and *Nederlandsche Middenstandsbank, N.V. etc.* v. *Bethlehem Steel Co.*, reported in the New York Law Journal, June 13, 1936 and *Anglo-Continentale Treuhand A.G.* v. *Bethlehem Steel Company*, 98 N. Y. L. J. 1164 October 15, 1937; modified, 6 N. Y. Supp. (2d) 334 (June 17, 1938) not yet officially reported, the decision of Justice Wasservogel in *Hydropress Handels A.G. etc.* v. *Lackawanna Steel Co., etc.*, 99 N. Y. L. J. 106, p. 2221, May 7, 1938; and the decision of Justice Rosenman in *Zurich General Accident & Liability Insurance Co. Ltd.* v. *Lackawanna Steel Co.*, 164 Misc. 498, aff'd *sub nom. Zurich General Accident and Liability Insurance Company, Ltd.* v. *Bethlehem Steel Company*, 254 App. Div. 839 (1937).

the reasons stated by Judge Hand in the opinion of the Circuit Court of Appeals, Second Circuit, in *Anglo-Continentale Treuhand, A.G.* v. *St. Louis Southwestern Ry. Co.*, 81 F. (2d) 11 (cert. den. *Henwood, Trustee* v. *Anglo-Continentale Treuhand, A.G.*, 298 U. S. 655).".

This important question of the scope and application of the Joint Resolution of June 5, 1933 with relation to multiple currency options has not been settled by this Court, although, as previously indicated, it was the only question involved in *Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company* where certiorari was denied in 298 U. S. 655. The petitioner argued before the Circuit Court that the denial of certiorari in the *Anglo-Continentale* case, where this Court plainly had jurisdiction to review and, if so minded, alter the result of the decision of the Second Circuit, was significant and should be given weight, even though it did not, of course, amount to a technical affirmance of the decision below. The Circuit Court, however, gave it no weight whatsoever, saying:

> "The argument of appellant that the denial of certiorari by the Supreme Court in the former (*Anglo-Continentale*) case should be given weight in the construction of the statute cannot be allowed . . . ."

The Circuit Court also ignored the construction given to the Joint Resolution in *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324, with respect to contracts providing for alternative methods of payment, but, instead, cited that case for the proposition that speculation as to the "evil to be remedied" was permissible in the absence of any Congressional language including the

guilder alternative within the evils against which the Joint Resolution was aimed.

3. The decision of the Circuit Court of Appeals affirming the disallowance of the guilder claim by the District Court departed so far from the accepted and usual course of judicial proceedings in bankruptcy as to call for an exercise of this Court's power of supervision.

The procedure of both courts below in scaling down the claim of the petitioner, as trustee, on these bonds, from the dollar value of the guilders which were elected to the dollar alternative in the bonds which was never elected and never became an enforcible contract, was an arbitrary deprivation of the rights of the bondholders represented by the petitioner. Virtually the only justification for such procedure attempted in the opinion of the Circuit Court of Appeals is that the Court was of the opinion that the contract claim in guilders or guilder value would entitle the First Terminal and Unifying bondholders to a larger participation in the reorganization than they would have had had they sought to enforce the dollar alternative in lieu thereof. This is, of course, beside the point. A court in reorganization proceedings has never had and should not have power or authority to compel any creditor to rely on his least remunerative contract; or to substitute for an executed and binding contract, a hypothetical agreement that never became legally operative.

Prayer.

For the foregoing reasons, which are developed in some detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the

United States Circuit Court of Appeals for the Eighth Circuit commanding said Court to certify and send to this Court on a day to be determined, a full and complete transcript of the record of all of the proceedings of such Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the final order and decree of the Circuit Court of Appeals be reversed; and that the petitioner be granted such other and further relief as is proper.

New York, N. Y., September 26, 1938.

GUARANTY TRUST COMPANY OF NEW YORK,

By JOHN W. DAVIS,
EDWIN S. S. SUNDERLAND,
RALPH M. CARSON,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The United States District Court for the Eastern District of Missouri, Eastern Division, wrote no opinion, but it made findings of fact and conclusions of law (R. 127-143). The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 246-254) is reported in 98 F. (2d) 160, the Advance Sheets for September 12, 1938.

Jurisdiction.

The decree of the Circuit Court of Appeals for the Eighth Circuit was entered July 15, 1938 (R. 254-5). The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938.

Statement of the Case.

A summary statement of the facts is given in the petition, pages 3-7 above.

Statutes Involved.

The Joint Resolution of June 5, 1933 (48 Stat. 112, Public Resolution No. 10, 73d Congress), in so far as material to this cause, provides as follows:

Whereas the holding of or dealing in gold affect the public interest, and are therefore subject to proper regulation and restriction; and

Whereas the existing emergency has disclosed that provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. Any such provision contained in any law authorizing obligations to be issued by or under authority of the United States, is hereby repealed, but the repeal of any such provision shall not invalidate any other provision or authority contained in such law.

(b) As used in this resolution, the term "obligation" means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term "coin or currency" means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations.

Specification of Errors to Be Urged.

All the errors assigned in the Court below are intended here to be urged (R. 210-18). These may be grouped as follows:

1. Failing to find and conclude as a matter of law that the power of electing between the alternative currencies stated in the bonds could be exercised only by or on behalf of the bondholders, and not by Congress or the Court on behalf of the Debtor or other creditors; that the demand for payment of guilders was duly made on September 24, 1936 by the petitioner on behalf of the bondholders; and that thereupon the bonds became straight and independent contracts to pay a specified number of guilders in Holland.

2. Holding and concluding that the guilder alternative in these bonds falls within the language and the policy of the Joint Resolution of June 5, 1933, and is thereby rendered null and void.

3. Scaling down the claim of the petitioner, as trustee, by refusing to enforce the straight contract for guilders and substituting therefor a claim based upon the dollar

alternative in the bonds which alternative was never elected, never became operative, and was not even sought to be enforced. This involves the failure of the courts below to determine as a matter of law that the objections contained in the protests against the proof of claim of the petitioner, as trustee (R. 106, 112, 113, 120-22) were without merit (R. 246-54, 143).

Summary of Argument.

I.

The present claim is based upon a straight contract for the payment of Dutch guilders in Holland, and the validity of this contract is in no way affected by the discarded and unexercised gold coin alternative stated in these bonds.

II.

The Joint Resolution of June 5, 1933 does not affect the contract of the Debtor in these bonds to pay a definite sum of Dutch guilders in Holland.

III.

The sole purpose of the Joint Resolution was to nullify gold clauses, and there was no intent or purpose whatsoever on the part of Congress to interfere with obligations payable in foreign currencies.

IV.

The construction of the Joint Resolution so as to reach contracts for the payment of Dutch guilders in Holland would make it unconstitutional.

ARGUMENT.

I.

The present claim is based upon a straight contract for the payment of Dutch guilders in Holland, and the validity of this contract is in no way affected by the discarded and unexercised gold coin alternative stated in these bonds.

These coupon bonds contained five mutually exclusive alternative promises at the time when they were first issued. One of these alternatives was a promise to pay $1,000 in gold coin of the United States of the standard of weight and fineness as it existed January 1, 1912. This alternative, however, was nullified in 1933 by the Joint Resolution, even if it had not been rendered impossible of performance by prior monetary legislation. *Emery Bird Thayer Dry Goods Co. v. Williams* (C. C. A. 8th, July 15, 1938), 98 F. (2d) 166. Thereafter the bonds contained only the remaining alternative promises to pay guilders, pounds, marks or francs, "at the holder's option"; and each bondholder also had a statutory option, based upon the Joint Resolution, to recover "dollar for dollar" in legal tender for every gold coin dollar originally promised in the gold coin alternative. At a still later date, in September, 1936, at the election of guilders by the petitioner, as trustee, on behalf of the bondholders, the statutory option for legal tender dollars and every alternative, except the guilder promise, was necessarily discarded; the bonds in question thereupon became straight contracts to pay guilders in Holland. *Anglo-Continentale Treuhand, A.G. v. St. Louis Southwestern Ry. Co.*, 81 F. (2d) 11. See *Yankton Sioux Tribe of*

Indians v. *U. S.*, 272 U. S. 351, 358 (1926); *Twaits* v. *Pennsylvania R. Co.*, 77 N. J. Eq. 103, 110, 75 A. 1010, 1013 (1910); Restatement, Contracts, §§325 (2), 344. Comment (b) and 469; 5 Williston on Contracts (Rev. Ed. 1936), sec. 1407, page 3920. In the first passage cited from the Restatement on Contracts it is said:

> "When an alternative contract has ceased to be alternative by reason of an election by the party having the option . . . a breach as to the one remaining alternative may occur in the same way as if the contract had originally provided for only that performance."

The present claim is simply a claim for damages for breach of contract to pay guilders. Whether or not there had once been an alternative promise to pay United States gold, or any other currency, has now become wholly immaterial. There has been no attempt to enforce the previously existing gold coin alternative. That alternative has been virtually stricken from the bonds, if not by the Joint Resolution itself, by the election of guilders and the consequent renunciation of any right to take gold.

Both courts below assumed that the guilder election was valid, but held that the Joint Resolution rendered the election ineffective. In so holding, they overlooked the fact that, because of the guilder election, the gold coin, and all other alternatives, had been irrevocably stricken from the bonds. This oversight was the fundamental error underlying both decisions below.

II.

The Joint Resolution of June 5, 1933, does not affect the contract of the Debtor in these bonds to pay a definite sum of Dutch guilders in Holland.

We submit that even a cursory reading of the Joint Resolution as a whole leaves no room for argument on this point. On its face the Resolution has nothing whatever to do with contracts calling for the payment of foreign money. The title, the preamble, the operative provisions of the Resolution, and the very definitions contained in the Resolution, leave no room for doubt; they strictly confine the statute to coins, currencies or money of the United States. "The United States" stand out as words of limitation in substantially every clause, from the title down to the definitions. When we come to the definitions we find that "the United States" are to be inserted in the text as words of limitation in those few clauses where they do not at first appear. Congress, in its manifest determination to exclude everything but coin, currency or money of the United States from the reach of the Resolution, expressly declares that:

> "(b) As used in this resolution, the term 'obligation' means an obligation (including every obligation of and to the United States, excepting currency) payable in money of the United States; and the term 'coin or currency' means coin or currency of the United States, including Federal Reserve notes and circulating notes of Federal Reserve banks and national banking associations."

Despite such extreme care in draftsmanship, the Circuit Court of Appeals for the Eighth Circuit held that the Resolution was ambiguous in so far as the present obligations,

payable in Dutch guilders, were concerned, saying (R. 249, 98 F. [2d] at 163):

> "In this instance, we are unable to conclude that the Resolution is, as to the matter here, unambiguous. The crucial word 'payable' is, standing alone, not confinable to one single definite meaning."

Because it was in doubt as to whether or not the words "obligation payable in money of the United States", as used in the Joint Resolution, covered the present contract to pay guilders in Holland, the Court below found, in some manner beyond our comprehension, sufficient cause for summarily dismissing those previous decisions in other Circuits (*Anglo-Continentale Treuhand, A. G.* v. *St. Louis Southwestern Railway Company* [C. C. A. 2nd, 1936], 81 F. [2d] 11, cert. den. 298 U. S. 655; *McAdoo* v. *Southern Pacific Company*, 10 F. Supp. 953 [N. D. Cal., 1935]), that had held the Resolution plainly inapplicable to foreign money alternatives. Having thus disposed of the applicable precedents, the Circuit Court of Appeals went on to hold that the guilder promise in these bonds constituted "an obligation payable in money of the United States" and was therefore rendered void by the Joint Resolution.

We shall not undertake a detailed analysis of the process of reasoning by which the Court below achieved such an astonishing result. The very result discloses that the steps in the reasoning were themselves erroneous.

In substance, the Circuit Court of Appeals seized upon the fact that as of January 1, 1912, the date of the issuance of the bonds, the five alternative currencies stated in the bonds were temporarily equivalent. It was solely because of this conceded equivalence of the alternatives on that par-

ticular date, some twenty-six years ago, that the court found any reason for including the guilder alternative within the prohibition of the Joint Resolution. In this connection the Court said (R. 252, 98 F. [2d] at 165):

> "The amount of guilders, pounds, francs or marks which might be elected by the obligee was, admittedly, determined by the value of the gold dollar as of January 1, 1912."

After expounding the fact that the guilder alternative had subsequently become more valuable than the dollar alternative and after assuming that the election of guilders by the obligee would consequently give that obligee an "advantage not warranted by the dollar value of their obligations", the Court continued:

> "The provision may or may not have had an entirely proper business purpose of making the bonds attractive to investors in Holland, England, France and Germany by providing for payment in the money of such countries within those countries. But it is the effect and not the purpose which is important. The effect is to freeze the unit of payment as of the gold dollar of the weight and fineness of January 1, 1912."

The Court again digressed upon the "advantage" or "premium" that, by its assumption, accompanied the guilder alternative in the bonds and said (R. 253-4, 98 F. [2d] at 166):

> "In short, the evil sought to be avoided by the Resolution is accomplished by a form of indirection and, to that extent, the purposes of the Resolution and, therefore, the Resolution itself defeated. We think such a result brings these instruments within

the intendment of the Resolution and within the ambiguous expressions, set out hereinabove, of the Resolution. The vice of these instruments, in the view of the Resolution, is that they provide for payment in gold dollars of a specified weight and fineness or, optionally with the holders, in foreign currencies, the amount or value of which is based upon that gold dollar."

The complete answer to this entire line of argument is found in the decision of the Circuit Court of Appeals for the Second Circuit in the *Anglo-Continentale* case, in which Judge Learned Hand pointed out that the gold question was not involved where the obligee had elected guilders, saying (81 F. [2d] 11):

"As has been seen, the coupons contained alternative promises; the holder might demand gold dollars, pounds, guilders, marks or francs at his choice. If he chose any of the foreign currencies he could not get gold; he must be content with whatever the money of the country might be on the due date; it might then be exchangeable for all sorts of things, gold, silver, copper, land, coffee; it might be 'inconvertible', not exchangeable for anything at all. When for example France and Germany and England went off the gold standard the defendant was relieved *pro tanto*, as it will be if Holland should similarly go off; it is therefore of no significance that she happens not to have done so in 1934 and 1935. If this were not plain enough from the absence from the promise of any requirement to pay gold, the contrast between foreign currencies and 'dollars in gold' would put it beyond doubt."

That in 1912, when the bonds were issued, the respective amounts of the alternative currencies were based upon the

gold dollar of that date is wholly immaterial. In fact there was no difference in value at that time between the gold dollar and the paper dollar. Since 1912 and since the passage of the Joint Resolution, there has been no necessary or actual equivalence in value between the dollar of 1912 gold or otherwise, and the other alternative currencies stated in the bonds. From 1912 to the present time the five alternative currencies stated in the bonds have actually fluctuated in value with relation to each other, and these five alternatives were not mutually equivalent in 1933, when the Joint Resolution became law, or at any time subsequent thereto. Thus the Court below was clearly in error when it found that the effect of the guilder option in these instruments ". . . is to freeze the unit of payment as of the gold dollar . . .".

Furthermore, the Court was unjustified in holding that "the evil sought to be avoided by the Resolution is accomplished by a form of indirection and, to that exent, the purposes of the Resolution and, therefore, the Resolution itself defeated." There could have been no attempt to evade the purpose of the Resolution or to defeat the Resolution itself when the guilder alternatives were placed in these instruments some twenty years before the Resolution became law. After the Resolution became law the election of guilders pursuant to the terms of the instruments was merely the exercise of a valid and innocent contract right previously granted for valuable consideration. It is utterly fanciful, therefore, to regard the granting and exercise of this particular contractual option as an attempt to evade, by a form of indirection or otherwise, the purpose of the Resolution.

Stripped of the erroneous assumptions (1) that the guilder alternative is the equivalent of a promise to pay

old and (2) that it was inserted in the bonds for the urpose of evading the Joint Resolution, no reason can be ound in the opinion of the Eighth Circuit Court of Appeals ustifying or even permitting the inclusion of the guilder lternative within the condemnation of the Joint Resolu- on. Indeed, there appear to be overwhelming reasons for oncluding that the Joint Resolution was never intended o cover a promise to pay guilders, such as that found in hese instruments.

III.

The sole purpose of the Joint Resolution was to ullify gold clauses, and there was no intent or pur- ose whatsoever on the part of Congress to interfere ith obligations payable in foreign currencies.

The Joint Resolution itself, as we have seen, contains hint of an intent on the part of Congress to interfere ith obligations payable in foreign currencies. Nor can y such purpose be found in the Committee Reports or in e Congressional debates with reference to the Joint Res- ution. Neither of the courts below could find any declara- on of such a purpose on the part of Congress, either in e Joint Resolution, or in the debates or Committee Re- rts in Congress. Both the Resolution itself and its legis- ive history disclose that the sole purpose of the Joint solution was to nullify gold clauses. Thus the Eighth rcuit Court of Appeals summarized the purpose of the solution as follows (R. 251, 98 F. [2d] at 164):

> "In short, the evil struck at by the Resolution was contract provisions purporting 'to give the obligee a right to require payment in gold or a par-

> ticular kind of coin or currency [of the United States] or in an amount in money of the United States measured thereby'—as defined in paragraph (b), 'payable in money of the United States.' 31 U. S. C. A. §463. The reason why this is an evil and the reason for preventing it being to prevent obstruction of the maintenance of the equal value of the various United States monies 'in the markets and in the payment of debts.' ''

This limited purpose is made even more clear when the Joint Resolution is considered in connection with other monetary measures contemporaneously enacted by Congress. See *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 295-7 where the series of measures relating to the currency, of which the Joint Resolution was but a part, are summarized by this Court. It is apparent from this summary, and indeed from the entire opinion of the Court, that the shortage of gold in 1933 created the necessity that called the Joint Resolution into being.

That the dislocation in the domestic economy caused by the shortage of gold was the sole cause for the passage of the Joint Resolution is further shown by the statements of Representative Steagall, Chairman of the Committee on Banking and Currency, who sponsored the Resolution in the House. He summarized the Resolution as follows (77 Cong. Rec. at p. 4528):

> "This resolution declares that contracts requiring the discharge of obligations solely by payments in gold are contrary to public policy; that hereafter no such contracts may be made and that all such contracts now in existence or that may hereafter exist shall be payable in lawful money of the United States."

He subsequently said (at p. 4529):

> "If the gold clause applied to a very limited number of contracts and security issues, it would be a matter of no particular consequence; but in this country virtually all obligations, almost as a matter of routine, contain the gold clause."

Multiple currency clauses, unlike gold clauses, applied to a very limited number of contracts and security issues in the year 1933. While the gold clause has been estimated to have been in contracts for seventy-five billions of dollars or more (see *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 313), foreign currency options do not amount to 1% of this sum. See Nussbaum, Multiple Currency and Index Clauses, 84 U. of Pa. Law Rev. 569, 575-6 (March, 1936).[1]

There are other fundamental distinctions between gold clauses and multiple currency clauses that would explain why Congress should nullify gold clauses, while sanctioning or ignoring multiple currency clauses. See Prof. Nussbaum's article, cited. At pages 576-7 of this article, the author makes a thorough analysis of the economic, social and political differences between multiple currency clauses and gold clauses, pointing out, among other things, that multiple currency obligations have always been undertaken with a clear understanding of their meaning. This observation is particularly applicable to the present case where the record shows that before execution of the First Terminal

[1] According to the computation of the Debtor's Trustee, at p. 6, in his unsuccessful petition for certiorari in *Henwood, Trustee* v. *Anglo Continentale Treuhand, A.G.*, 298 U. S. 655, only $90,000,000 face amount of outstanding bonds have alternative provisions for payment in moneys of countries remaining on the pre-war gold standard. This is a little more than 1/10 of 1% of the aggregate of bonds containing the gold clause.

and Unifying Mortgage the Debtor made arrangements with the petitioner, contemplating payment of "a fair current rate" for the guilders, should the bondholders demand them (R. 172).

The provisions of the Joint Resolution are explicit and its purpose is clear. The only argument for including multiple currency clauses within its provisions requires the divorce of a single sentence in the Resolution from its context in complete disregard of the obvious purpose of the statute as a whole. This sentence, upon which the court below placed so much emphasis, is the second sentence in paragraph (a). With the applicable statutory definitions inserted in brackets, this sentence reads:

> "Every obligation [payable in money of the United States], heretofore or hereafter incurred, whether or not any such [*i. e.*, gold clause] provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency [of the United States] which at the time of payment is legal tender for public and private debts."

The respondents have seriously contended that the bonds in question are obligations payable in money of the United States because one of the five alternative methods of payment, *prior to the election of guilders*, was in gold coin of the United States, and that consequently the Resolution requires that these instruments "shall be discharged upon payment dollar for dollar" in legal tender. Inasmuch as the foreign money alternatives cannot possibly be discharged "dollar for dollar", the contention is that they have been nullified by implication. This ingenious construction of the Resolution is obviously unsound. It ignores the

commercial meaning of the word "payable" as that which must be paid. *Ingram v. Mandler*, 56 F. (2d) 994, 997 (C. C. A. 10th, 1932); Note, (1935) 49 Harv. L. Rev. 152, 153. It ignores the fact that the bonds could not be paid in money of the United States prior to an election of that medium of payment on the part of the bondholder. It ignores the fact that no obligation of the Debtor payable in money of the United States was ever "incurred", as the very language of the Resolution requires, because no election to receive money of the United States in payment had ever been made. It ignores the fact that the sole surviving obligation or duty "incurred" by the Debtor, viz.—to pay guilders, cannot possibly be discharged upon payment "dollar for dollar". It therefore assumes that the word "obligation" means the instrument evidencing the debt and not the debt itself. It further assumes that the clause "whether or not any such provision is contained therein or made with respect thereto" is without significance and only means that it is immaterial whether or not the instrument contains a gold clause provision. This Court, on the other hand, has previously construed this clause to mean "irrespective of any provision contained therein whereby the obligee was given a right to require payment in gold" or "though it contains such provisions". See *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U. S. 324, 334, 339. In short, the Resolution is construed as providing that every instrument that might possibly have been paid in money of the United States at any time shall now be fully discharged upon the payment of legal tender dollars "dollar for dollar".

So construed, the Resolution has nothing to do with gold clauses, but destroys every promise, provision or clause in any instrument that might possibly be paid in

dollars, and requires that the dollar promise shall be paid in legal tender dollars. In other words, a written instrument giving the obligee the right to claim $5 or a horse, at his option, "shall be discharged" upon the payment of $5 in legal tender. It is thus immaterial whether the alternative promise that is destroyed is against public policy or not; as long as it is not a dollar promise it would be completely destroyed by this construction of the Joint Resolution. Accordingly, the preamble to the Joint Resolution and the first sentence in paragraph (a) declaring gold clauses illegal and against public policy have been reduced to mere surplusage. By this construction the Joint Resolution is not a monetary regulation at all, is not directed against gold clauses, but is merely an attempt by Congress, for no apparent reason, to eliminate alternative contracts wherever one of the alternatives permits the payment of United States money.

The contended construction is, we submit, untenable. And in another case, decided on the same day, the Eighth Circuit so held. *Emery Bird Thayer Dry Goods Company* v. *Williams* (C. C. A. 8, July 13, 1938), 98 F. (2nd) 166. The entire purpose and effect of the Joint Resolution has been summarized by this Court in *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. at 338-9, as follows:

> "The Resolution touches gold as well as coin or currency [of the United States] whenever transactions in either are within the evil to be remedied. We learn from the preamble that 'provisions of obligations which purport to give the obligee a right to require payment in gold or a particular kind of coin or currency of the United States, or in an amount in money of the United States measured

thereby, obstruct the power of the Congress to regulate the value of the money of the United States, and are inconsistent with the declared policy of the Congress to maintain at all times the equal power of every dollar, coined or issued by the United States, in the markets and in the payment of debts.' Accordingly, all such provisions are declared to be against public policy, and every obligation, heretofore or hereafter incurred, though it contain such provisions, shall be payable, dollar for dollar, in legal tender at the time of payment."

It is apparent from the foregoing that the Resolution does not touch a contract to pay foreign money in a foreign country; that it touches only gold and money of the United States, whenever transactions in either obstruct the power of Congress over money of the United States.

IV.

The construction of the Joint Resolution so as to reach contracts for the payment of Dutch guilders in Holland makes it unconstitutional.

The Joint Resolution has been held to be a constitutional exercise by Congress of its power over the currency of the United States only in so far as it applies to gold clauses in obligations payable in this country in money of the United States. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240; *Perry* v. *U. S.*, 294 U. S. 330; *Holyoke Water Power Co.* v. *American Writing Paper Co.*, 300 U. S. 324; *Smyth* v. *U. S.*, 302 U. S. 329. The reasonableness of the Resolution in removing the gold clause as a burden on and interference with the monetary power of Congress is fully expounded in the

Norman case. The reasons there given, however, would be inapplicable to the nullification of multiple currency clauses.

The Joint Resolution, as construed by the courts below, so as to apply to multiple currency clauses, as well as gold clauses, becomes not a monetary regulation but a mere repudiation statute, and hence unconstitutional. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 602. Furthermore, it is highly doubtful whether Congress could legislate as to extra-territorial matters, such as the obligation of the Debtor here to pay guilders in Amsterdam. See *Sandberg* v. *McDonald*, 248 U. S. 185, 195; *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

We submit that the construction of the Joint Resolution by the courts below, raising so many grave doubts as to its constitutionality, can not be accepted. See *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 30.

Conclusion.

This cause involves Federal questions of first importance which should be reviewed and settled by this Court and a writ of certiorari should issue for that purpose, as prayed in the foregoing petition.

Respectfully submitted,

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